Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of	)	
	)	
	)	
Review of the Commission's Program	)	MB Docket No. 07-198
Access Rules and Examination of	)	
Programming Tying Arrangements	)	

To: The Commission

COMMENTS OF NBC UNIVERSAL, INC. AND NBC TELEMUNDO LICENSE CO.

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Review of the Commission's Program Access Rules and Examination of Programming Tying Arrangements	)))	MB Docket No. 07-198

To: The Commission

COMMENTS OF NBC UNIVERSAL, INC. AND NBC TELEMUNDO LICENSE CO.

The Commission has launched this proceeding to consider whether it should intervene in the wholesale market for the sale of video programming by "precluding" what it mischaracterizes as "tying arrangements" between broadcasters and multichannel video programming distributors ("MVPDs") and between non-broadcast cable programmers and MVPDs.[1] These comments demonstrate, contrary to the Commission's unsupported assumptions, that:

1. **<u>Programming packages, which originated with MVPDs, involve no improper conduct and have evolved as the preferred form of transaction in the wholesale video programming market.</u>**

    - Programmers do not engage in untoward or improper conduct in their free market negotiations with MVPDs. Since the passage of the 1992 Cable Act, broadcasters have always been willing to grant retransmission consent on a

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[1] *See Review of the Commission's Program Access rules and Examination of Program Tying Arrangements*, Notice of Proposed Rulemaking, MB Docket No. 07-198, FCC No. 07-169, __ FCC Rcd __ (rel. Oct. 1, 2007) ("NPRM").

standalone basis for cash or other agreed-upon consideration reflecting the market value of these signals.

- MVPDs, however, have strongly preferred providing in-kind consideration, such as carriage of affiliated programming services, rather than cash in exchange for broadcast signals, and Congress expressly endorsed this form of consideration when it adopted the 1992 Cable Act.
- As a result, a fully negotiated and complex combination of in-kind consideration, cash subscriber fees, and other elements tailored to the preferences of MVPD purchasers has evolved as the preferred form of transaction in the wholesale video programming marketplace.
- The history of the 1992 Cable Act makes it undeniably clear that this preferred form of transaction originated with the cable operators and resulted from their widely publicized refusals to pay cash to broadcasters, leading the Senate Commerce Committee to launch an investigation into possible collusive action by these operators.
- The empirical evidence proves that "take-it-or-leave-it" offers are not presented to MVPDs, whether large or small. Only two percent of MVPDs carry all six of the major cable programming networks offered by NBC Universal (Bravo, CNBC, CNBC World, MSNBC, Sci Fi and USA). Eighteen percent of those MVPDs carrying any NBCU networks take only one of these six networks. Among small operators who do not contract for NBCU networks through NCTC, approximately 85 percent take no more than one or two NBCU networks.

2. **<u>The apparent drive by the Commission to link multi-faceted wholesale transactions to the tiering of program packages by MVPDs at the retail level is historically inaccurate and unsupported.</u>**

- Long before the adoption of the 1992 Cable Act or the evolution of non-broadcast programming services, cable operators bundled broadcast signals into retail service tiers.
- Commission intervention in the voluntary, multi-faceted wholesale transactions between programmers and MVPDs is unwarranted and in any event would not eliminate retail tiers. MVPDs will continue to group channels into tiers because such tiering reduces transactional, administrative and equipment costs and offers more programming choices to consumers.

3. **<u>Carriage agreements for multiple channels do not involve "tying arrangements" and comply fully with the antitrust laws.</u>**

- From the perspective of antitrust law, the carriage agreements between programmers and MVPDs do not – and cannot – constitute unlawful "tying arrangements."
- "Tying" under the antitrust laws requires three elements, none of which is present in the wholesale video programming market:
    - a seller with market power in one product market (the "tying product)
    - uses that power to coerce a buyer into purchasing an undesired product (the "tied" product) in a separate and distinct product market
    - thereby shutting out competition in the market for the tied product.
- The video programming market constitutes a single market for antitrust purposes. There are no separate markets for tying and tied products.

- The video programming market is highly competitive – no supplier has market power.
- Therefore, "tying" cannot occur.

4. **Wholly apart from the fact that the negotiations and agreements between programmers and MVPDs are entirely proper and legal, the Commission has no jurisdiction to intervene in these business relationships.**

- Congress expressly endorsed the option of granting retransmission consent in exchange for carriage of affiliated programming services.
- Congress did not authorize the Commission to exercise "detailed substantive oversight" of the wholesale video programming marketplace.

I. INTRODUCTION AND SUMMARY

NBC Universal, Inc. and NBC Telemundo License Co. (collectively, "NBCU") have a vital interest in this proceeding. NBC Telemundo License Co. is the licensee (or controls the licensee) of 10 owned and operated television stations affiliated with the NBC network, all of which elect retransmission consent.[2] NBC Universal, Inc. is the owner of a number of non-broadcast cable programming networks, including Bravo, Chiller, CNBC, CNBC World, MSNBC, mun2, Oxygen, Sci Fi, Sleuth, Sundance Channel, Telemundo (where the programming is not carried by broadcast affiliates), Universal HD and USA.[3] NBCU will be adversely affected in its negotiations with MVPDs if the Commission restricts programmers

[2] NBC Telemundo License Co. also is the licensee (or controls the licensee) of 16 Spanish-language television stations, 14 of which are affiliated with the Telemundo network and two of which are independent. These stations historically have elected mandatory carriage.

[3] The category of non-broadcast cable programming at issue in the NPRM is "satellite cable programming," which is defined in the rules as "video programming which is transmitted via satellite and which is intended for direct receipt by cable operators for their retransmission to cable subscribers." 47 C.F.R. § 76.1000(h). The term encompasses the non-broadcast programming channels offered by NBCU identified above.

from offering packages of channels as an option in their wholesale distribution agreements with MVPDs, because such offers have historically been the most attractive and efficient for both parties.

According to the Commission, "tying arrangements" compel small and rural cable operators and other MVPDs to take unwanted or less desirable programming as a condition of obtaining "marquee" programming, such as premium channels and regional sports networks.[4] But the Commission has not shown – and cannot show – that "tying" occurs. Further, the agency has no statutory authority to prohibit the negotiated combination of in-kind consideration, cash subscriber fees and other elements tailored to the preferences of MVPD purchasers that has evolved as the preferred form of transaction in the wholesale video programming marketplace.

The term "tying" has a precise meaning in antitrust jurisprudence. Tying requires, as a threshold element, that a firm with market power in one product market (the "tying" product) uses that power to coerce a buyer into purchasing a product (the "tied" product) in a separate and distinct product market. Thus, tying comes within the purview of the antitrust laws only if, among other things, the tying and tied products are in different product markets, and the seller has market power with respect to the tying product. Merely offering packages of programming channels in retransmission consent or other program distribution negotiations in a single product market in which the seller lacks market power does not constitute tying. [5]

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[4] NPRM, ¶ 119.

[5] Accordingly, in these comments, we generally use the term "packaging" and variations thereof to describe the actual business practices of programmers, and we refer to "tying" only when quoting the NPRM or referring to the practice, described above, of a seller with market power in one product

As far as wholesale packaging of programming channels is concerned, the Commission has no legal authority to regulate it. With respect to broadcast channels, Congress approved the practice of granting retransmission consent in exchange for carriage of affiliated programming services in 1992 when it amended the Communications Act of 1934, as amended (the "Act") to codify the right of broadcasters to control the redistribution of their television signals. Congress's clear expression of intent on this point precludes the adoption of regulations restricting the packaging of broadcast channels with affiliated non-broadcast channels. With respect to non-broadcast programming channels, none of the potential sources of authority cited by the NPRM provides the Commission with jurisdiction to preclude voluntary transactions that include wholesale packages. Additionally, a Commission rule precluding such packaged offerings would violate the First Amendment rights of programmers.

As far as tying is concerned, even assuming the Commission has the power to address such antitrust concerns, it has not attempted to do so here. The Commission completely eschews the rigors of antitrust law with respect to tying, failing to address the applicable law and its requirements. For example, the Commission has not defined the separate markets for the tying or tied products or engaged in any type of market analysis. Moreover, the Commission has provided no factual basis showing that "take-it-or-leave-it" behavior occurs in the wholesale marketing of video programming. The statistical and testimonial evidence we present demonstrates that the "take-it-or-leave-it" arrangements cited by the Commission as the predicate for the proposed regulatory intervention do not

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market using that power to coerce a buyer into purchasing a product in a second product market, thereby foreclosing competition in the second market.

occur. The evidence also confirms that the market for the sale of video programming is highly competitive, and no single supplier within that market possesses market power.

As an end-run around a rigorous market analysis, the Commission relies on the concept of "marquee" programming. That concept, however, has no definable boundaries and no basis in the Act or antitrust law. Further, the Commission has failed to demonstrate that the owners of such "marquee" programs have the type of market power that could support a tying charge under the applicable laws even if the Commission could show separate markets for the supposed tying and tied products.

The NPRM also disregards the demonstrated benefits of wholesale packaging of programming networks, which allows programmers to realize economies of scale and scope that reduce the costs of producing, marketing and distributing their programming. These costs savings, in turn, allow programmers to offer a price for a program package that is lower than the aggregate price if each channel were purchased separately. Offering wholesale packages also helps programmers to launch and distribute new programming services, not by "coercing" MVPDs into carrying the new services, but by offering discounts on popular, established networks in exchange for distribution of new channels. This in turn promotes greater competition among programmers and substantially increases programming choices for consumers. A prohibition on offering wholesale packages will therefore lead to increased costs and decreased programming diversity, threatening the important Commission objectives of affordability and diversity in video programming.

To the extent the Commission's rationale for launching this proceeding stems from its apparent assumptions that wholesale packaging causes retail packaging of video content into "tiers," which in turn results in retail rate increases, these assumptions are incorrect.

MVPDs and certain statutory provisions determine the content of retail tiers. Cable operators bundled broadcast signals into tiers long before the 1992 Cable Act codified the right of broadcasters to negotiate the terms of signal carriage. Similarly, when non-broadcast cable channels unaffiliated with any broadcasters began to develop in the 1970s and 1980s, cable operators bundled these program services into tiers as well. Such bundling takes place frequently in our economy for legitimate and beneficial reasons. For example, retail packaging by MVPDs of video programming networks in widely subscribed tiers leads to greater advertiser support for these networks. Therefore, advantageous tier placement helps to keep programming costs down, which in turn may benefit consumers if these savings are passed on to subscribers.

In sum, the "harms" that the Commission envisions in the NPRM are illusory, and Commission intervention in the wholesale programming distribution marketplace cannot be justified. Accordingly, NBCU urges the Commission to refrain from intervening in the voluntary marketplace negotiations between programmers and MVPDs and to let the free market in video programming continue to operate as Congress intended.

II. CONGRESS AND THE COMMISSION HAVE EXPRESSLY APPROVED THE PRACTICE OF GRANTING RETRANSMISSION CONSENT IN EXCHANGE FOR CARRIAGE OF AFFILIATED PROGRAMMING NETWORKS, A FORM OF TRANSACTION THAT ORIGINATED WITH AND IS PREFERRED BY MVPDS

In 1992, Congress enacted the Cable Television Consumer Protection and Competition Act ("1992 Cable Act")[6] to rectify a competitive imbalance in the video programming distribution market resulting from a misinterpretation of law by the Commission that allowed cable operators to retransmit valuable local broadcast channels without the broadcaster's consent, for no consideration and under a favorable statutory

[6] Pub. Law No. 102-385, 105 Stat. 1460 (1992).

copyright license.[7] Congress recognized that the cable television industry had changed dramatically from its inception as a relay system bringing broadcast signals into hard-to-reach geographical areas to a full-fledged and rapidly growing programming competitor to local television stations.[8] In this transformed video marketplace, cable operators paid top dollar to obtain the right to transmit cable-only programming services, but refused to compensate broadcasters for the right to retransmit the popular network, syndicated and local programming carried on their stations even though "a very substantial portion of the fees which consumers pay to cable systems is attributable to the value they receive from watching broadcast signals."[9] Congress feared the resulting competitive imbalance – in which the Commission's misinterpretation of the law forced broadcasters to subsidize their primary competitors – jeopardized the continued existence and vitality of free, over-the-air television and would result in "a system which requires consumers to pay for television service."[10]

The cornerstone of the legislative effort to restore competitive balance, end the unwarranted subsidy to cable and preserve free, over-the-air television was the 1992 Cable Act's codification of the longstanding principle that broadcasters are entitled to control the redistribution of their channels through the mechanism of retransmission consent and to be compensated for the use of their programming by cable operators. Citing the benefit to consumers of introducing new programming services, Congress also expressly endorsed the

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[7] S. Rep. No. 102-92, at 35-36 (1991), accompanying S. 12, 102nd Cong. (1991) ("Senate Report").
[8] *Id.* at 36.
[9] *Id.*
[10] *Id.*

right of broadcasters to bargain for carriage of an affiliated non-broadcast programming service in exchange for retransmission consent:

> Other broadcasters may not seek monetary compensation, but instead negotiate other issues with cable systems, such as joint marketing efforts, the opportunity to provide news inserts on cable channels, or the right to program an additional channel on a cable system. It is the Committee's intention to establish a marketplace for the disposition of the rights to retransmit broadcast signals; it is not the Committee's intention in this bill to dictate the outcome of the ensuing marketplace negotiations.[11]

Cable operators reacted to the 1992 Cable Act with a widely publicized refusal to pay cash for the right to retransmit broadcast signals. The position of the cable industry in the initial round of retransmission consent negotiations is well known to the Commission, which recounted this history in its 2005 Report to Congress on Retransmission Consent and Exclusivity Rules pursuant to the Satellite Home Viewer Extension and Reauthorization Act ("SHVERA").[12] The cable pushback was led by John Malone of TCI, then the nation's largest cable company, who declared "Read my lips. We will not pay for local signals."[13] Malone's "unusually bellicose" pronouncement[14] was publicly echoed by 13 of the top 20 multiple-system cable operators ("MSOs"), including Comcast, Time Warner, Continental Cablevision, Viacom, Cablevision Systems and Jones Intercable, which, along with TCI, served nearly 60 percent of the nation's cable subscribers. Continental's Amos Hostetter, for example, characterized cash payments to broadcasters as "unthinkable."[15] Richard Aurelio, then

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[11] *Id.* at 36.

[12] "Retransmission Consent and Exclusivity Rules: Report to Congress Pursuant to Section 208 of the Satellite Home Viewer Extension and Reauthorization Act of 2004" at 6-8 (Sept. 8, 2005), 2005 FCC LEXIS 4976 ("2005 SHVERA Report").

[13] "Biggest Fight on TV Will Be Off Screen," Dallas Morning News, at 1C (June 21, 1993).

[14] "The War to Come," Electronic Media, at 12 (Oct. 12, 1993).

[15] "'Serious Disruption' Warning: Continental Rejects Retransmission Consent Fees as 'Unthinkable,'" Communications Daily, at 1 (Apr. 30, 1993).

president of Time Warner Cable in New York, declared that "we can foresee no circumstances where we would pay cash."[16]

The refusal to pay cash by 14 of the top 20 and 5 of the top 6 MSOs – announced even before negotiations began – was so uniform that Senate Commerce Committee Chairman Daniel Inouye asked the Justice Department and the Federal Trade Commission to investigate whether the cable companies had violated the antitrust laws by colluding with each other on the terms and conditions of broadcast signal carriage.[17] In the face of Senator Inouye's threatened investigation and as the initial statutory deadline for retransmission consent/must-carry elections approached, TCI, while reiterating its refusal to pay cash, stated that it might be willing to make room on its systems for a new cable channel a broadcaster might start.[18]

Confronted with the cable operators' unwillingness to negotiate for cash, a number of broadcasters accepted the MSOs' proffered compromise of programming new cable channels in exchange for granting retransmission consent to cable operators and, in some cases, receiving subscriber fees for the new channels. Fox was the first of the four major broadcast networks to retreat from its request for cash compensation, striking a deal with TCI involving the carriage of its new cable channel called FoxNet (which later became FX)

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[16] *See* "The Retransmission Consent Requirement – Why Congress Embraced the Free Market and Put a Stop to Cable System Carriage of Television Stations Without Fair Competition," at 6 (prepared by Antoinette Cook Bush, David H. Pawlik and Margaret E. Lancaster of Skadden Arps Slate Meagher & Flom, LLP, and attached hereto as Exhibit A) (hereinafter "Retransmission Consent History").

[17] "Inouye Poses Antitrust Questions on Retransmission Consent Decisions," Communications Daily, at 2 (Aug. 11, 1993).

[18] Retransmission Consent History at 6, *citing* Mark Robichaux, Cable Cowboy: John Malone and the Rise of the Modern Cable Business (John Wiley & Sons, Inc. 2002).

and its owned and affiliated stations for 25 cents per subscriber per month.[19] ABC followed suit by negotiating with cable operators to carry ESPN2, and NBC negotiated for the launch of its all-talk network, "America's Talking," which later became MSNBC.[20] Other group owners of broadcast stations also created new programming channels: Scripps launched Home and Garden, and Hearst helped to establish Lifetime and A&E Television Networks, the home of award-winning channels Biography, History, History International and A&E.[21] On a local, non-network basis, non-cash retransmission negotiations led to the introduction of new 24-hour cable news channels in a number of markets, including Washington, D.C., Chicago, New York City, Boston, Seattle, Pittsburgh and Orange County, California.[22]

Following similar compromises between broadcasters and cable operators across the nation, the initial round of retransmission consent negotiations was concluded relatively successfully, and multiple new programming channels were launched and packaged with broadcast channels. Cable operators emphasized the benefits of these many new services for consumers. In Pittsburgh, for example, TCI's local manager co-authored an op-ed piece with the licensee of Station WPXI, which launched a regional news channel in exchange for retransmission consent, highlighting the benefits of both the cable/broadcaster compromise and the new service: "[The new channel] offers 98 percent of cable subscribers in southwestern Pennsylvania a valuable new service. . . . Each [party] looked beyond the short-sighted approach of cash compensation to the long-term gains that could be achieved

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[19] Retransmission Consent History at 6.

[20] Id. at 7. CBS continued to press for cash compensation – unsuccessfully – and eventually was forced to grant extensions of the deadline and to consent to carriage of its television stations without charge before ultimately launching a new channel, "Eye on People." *Id.* at 7.

[21] A&E is a joint venture established in 1995 by Hearst, ABC and NBCU. *See* http://www.aetn.com/about.html.

[22] Retransmission Consent History at 7.

through the nurturing of a new service. . . . The marriage between TCI of Pennsylvania and WPXI will benefit this region."[23]

Cable operators also made clear to broadcasters that they strongly preferred to provide in-kind consideration rather than cash for the right to retransmit broadcast signals. As a result, a negotiated combination of in-kind consideration, cash subscriber fees and other elements tailored to the preferences of MVPD purchasers has evolved as the preferred form of transaction in the wholesale video programming marketplace. That pattern has been repeated successfully in four retransmission consent negotiation cycles spanning fifteen years and involving literally thousands of retransmission consent agreements that involve a plethora of complex business points.[24] As the Commission reported to Congress in the 2005 SHVERA Report, most of these agreements have involved the cable operators providing some form of in-kind consideration to the broadcasters in exchange for retransmission consent, including carriage of broadcaster-affiliated programming services:

> Twelve years later, cash still has not emerged as a principal form of consideration for retransmission consent. Today, virtually all retransmission consent agreements involve a cable operator providing for in-kind consideration to the broadcaster.[25]

Both sides have continued to recognize the benefits of these arrangements, as have consumers. Cable operators have benefited from the carriage of broadcast stations and the ability to offer their subscribers a wider variety of non-broadcast programming choices. Broadcasters have been able to secure carriage of their stations and affiliated non-

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[23] "Lessons Learned from Consent Deal," Electronic Media, at 12 (Nov. 22, 1993).

[24] In all of that time, only about 11 complaints have been filed at the Commission, and almost all of these complaints were eventually settled through negotiations by the parties. The only adjudicated case found that the MVPD – not the broadcaster – had failed to bargain in good faith. *See* Retransmission Consent History at 10.

[25] 2005 SHVERA Report at 7, 9-10 (footnotes omitted).

broadcast programming services on cable systems, thereby making their programming available to a wider audience and enhancing their ability to attract advertisers. Consumers have enjoyed unprecedented diversity in video programming. The bottom line is: retransmission consent has worked as Congress intended in 1992 when it sought to "establish a marketplace for the disposition of the rights to transmit broadcast signals."[26]

As the Commission acknowledges in the NPRM, it, too, has repeatedly recognized that agreements to grant retransmission consent in exchange for the carriage of affiliated non-broadcast programming channels are consistent with competitive marketplace considerations, comply with the broadcasters' good faith negotiation obligation and serve the public interest.[27]

In 2000, when the Commission first adopted rules imposing a good faith obligation on broadcasters in their negotiations with MVPDs, the agency ruled that "proposals for carriage conditioned on carriage of any other programming, such as a broadcaster's digital signals, an affiliated cable programming service, or another broadcast station either in the same or a different market" are "presumptively consistent" with competitive marketplace considerations and the good faith negotiation requirement.[28]

In 2001, the Commission considered, but declined to adopt, regulations that would have prohibited a broadcaster from conditioning carriage of the analog signal on carriage of the related digital signal. The Commission found that the proponents of such regulations

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[26] Senate Report at 35-36.

[27] NPRM, ¶ 9.

[28] The good faith requirement was added to Section 325(b) by the Satellite Home Viewer Improvement Act of 1999. *See Implementation of the Satellite Home Viewer Improvement Act of 1999; Retransmission Consent Issues: Good Faith Negotiation and Exclusivity*, First Report and Order, 15 FCC Rcd 5445, 5469 (2000) ("Good Faith Order").

failed to offer the "substantial evidence" required to prove that such "tying arrangements" (as opposed to wholesale packaging) in fact existed and caused harm to operators or their subscribers. The Commission also cited to its ruling in 2000 that conditioning carriage of a broadcast signal on the carriage of any other broadcaster-owned programming stream is presumptively consistent with the broadcaster's good faith negotiation obligation.[29]

In the 2005 SHVERA Report, the Commission, at the direction of Congress, reported on its extensive review of the retransmission consent system and its impact on video competition. This review included a detailed examination of the practice of granting retransmission consent in exchange for the carriage of broadcaster-affiliated programming networks.[30] The Commission concluded in the 2005 SHVERA Report that the retransmission system was functioning properly – "broadcasters [are] in fact being compensated for the retransmission of their stations by MVPDs, and MVPDs [are] obtaining the right to carry broadcast signals" – and that it was unnecessary to recommend specific statutory amendments.[31]

In sum, each time the Commission has examined the practice of packaging broadcast signals with non-broadcast programming channels, it has reached the same conclusion – the retransmission consent system is working as Congress intended, and no intervention in this competitive market is required. The Commission's cautious approach to

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[29] *Carriage of Digital Television Broadcast Signals; Amendments to Part 76 of the Commission's Rules, Implementation of the Satellite Home Viewer Improvement Act of 1999*, First Report and Order and Further Notice of Proposed Rulemaking, 16 FCC Rcd 2598, 2613 (2001).

[30] 2005 SHVERA Report at 25.

[31] *Id.* at 3, 24-25; Retransmission Consent History at 9. The Commission had reached a similar conclusion in 2004 when it found that "the current retransmission consent process is a function of the statutory framework adopted by Congress and we cannot conclude that it is not working as intended." *Report on the Packaging and Sale of Video Programming Services to the Public*, 2004 FCC LEXIS 6518 (2004); Retransmission Consent History at 15.

any disruption of the retransmission consent regime or intervention into the free market negotiations of MVPDs and programmers is amply justified. As demonstrated below, the Commission has no legal authority to regulate the substance of program distribution agreements by restricting the forms of consideration that may be requested and agreed to by programmers and MVPDs.

III. THE COMMISSION LACKS AUTHORITY TO REGULATE THE SUBSTANTIVE TERMS OF CARRIAGE AGREEMENTS BETWEEN PROGRAMMERS AND MVPDS

The FCC is a creature of statute and has no authority to act beyond the powers expressly delegated to it by Congress.[32] Because no provision of the Act gives the Commission the statutory authority to regulate the substantive terms of wholesale programming distribution agreements, any such regulations adopted by the Commission would exceed its jurisdiction.

A. The Commission May Not Require Broadcasters To Negotiate Retransmission Consent On A Standalone Basis

The text, legislative history and policies behind Section 325(b) of the Act show that Congress clearly intended to permit broadcasters to negotiate for the carriage of affiliated non-broadcast programming networks in exchange for retransmission consent. Faced with this clear congressional intent, the Commission lacks the authority to require broadcasters to negotiate retransmission consent on a standalone basis. As the Commission acknowledged in the Good Faith Order, "when Congress intends the Commission to directly insert itself in the marketplace for video programming, it does so with specificity."[33] There is

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[32] *See Motion Picture Ass'n of Am. v. FCC*, 309 F.3d 796, 801 (D.C. Cir. 2002) ("An agency may not promulgate even reasonable regulations that claim a force of law without delegated authority from Congress").

[33] Good Faith Order, ¶ 23.

"nothing supporting a construction of Section 325(b)(3)(C) that would grant the Commission authority to impose a complex and intrusive regulatory regime"[34] such as that proposed in the NPRM.

With respect to Section 325(b)(1), that provision has a single purpose – to prohibit an MVPD from retransmitting a television station's signal without the station's consent.[35] Neither the statute nor the legislative history restricts the terms of retransmission consent negotiations between broadcasters and MVPDs. Further, the legislative history of the provision expressly <u>endorses</u> what has become the preferred form of transaction between broadcasters and MVPDs:

> <u>Other broadcasters may not seek monetary compensation, but instead negotiate other issues with cable systems, such as joint marketing efforts, the opportunity to provide news inserts on cable channels, or the right to program an additional channel on a cable system</u>. It is the Committee's intention to establish a marketplace for the disposition of the rights to retransmit broadcast signals; it is not the Committee's intention in this bill to dictate the outcome of the ensuing marketplace negotiations.[36]

Moreover, any action by the Commission imposing a wholesale packaging restriction on broadcasters would contravene the very purpose Congress sought to achieve in enacting Section 325(b)(1) – to restore the competitive balance between broadcasters and cable operators – by tying the hands of broadcasters in these negotiations.

Nor does Section 325(b)(3)(C) offer a legal basis for precluding agreements in which broadcast and non-broadcast channels are made available in a package. Under Section 325(b)(3)(C)(i), as the Commission has acknowledged,[37] broadcasters are allowed to package

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[34] Id.

[35] *See* Senate Report at 36.

[36] Senate Report at 35-36 (emphasis added).

[37] NPRM, ¶ 126.

their programming assets in their agreements with MVPDs who do not want to pay cash for carriage of the broadcast channel or who prefer a packaged alternative to a standalone alternative. Broadcasters also are permitted under Section 325(b)(3)(C)(i) to price channel packages preferentially relative to standalone offerings based on "competitive marketplace considerations":[38]

> . . . it shall not be a failure to negotiate in good faith if the television broadcast station enters into retransmission consent agreements containing <u>different terms and conditions, including price terms</u>, with different multichannel video programming distributors if such different terms and conditions are based on competitive marketplace considerations[.][39]

Congress also made clear in its 2004 amendment to Section 325(b)(3)(C), which imposed an identical reciprocal good faith obligation on MVPDs, that it did not intend to authorize the Commission to meddle in the substance of retransmission consent negotiations.[40] By making the statutory good-faith language applicable to broadcasters and MVPDs identical, Congress underscored that any obligations resulting from the good-faith requirement were required to be imposed equally on broadcasters and MVPDs. In implementing the obligation, the Commission also recognized that the "will of Congress" was that any good-faith obligation should apply equally to broadcasters and MVPDs and that the agency lacked the authority to make any substantive modifications to the existing good faith rule or the new parallel MVPD rule:

> Because the Commission has in place existing rules governing good faith retransmission consent negotiations and because Congress did not instruct us through the SHVERA to modify those rules in any substantive way, we conclude that the most faithful and expeditious implementation of the amendments contemplated

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[38] *Id.*

[39] *Id.* (emphasis added).

[40] *See* Satellite Home Viewer Extension and Reauthorization Act of 2004, Pub. L. No. 108-447, § 207, 118 Stat 2809, 3393 (2004) (codified at 47 U.S.C. § 325(b)(3)(C)(iii)).

> in Section 207 of the SHVERA is to extend to MVPDs the existing good faith bargaining obligation imposed on broadcasters under our rules.[41]

If the Commission were to adopt a rule prohibiting broadcasters from offering retransmission consent in exchange for carriage of affiliated programming channels, this prohibition is inherently <u>not</u> reciprocal, but rather would be a burden placed entirely on broadcasters and thus would be contrary to the "will of Congress" expressed in SHVERA.[42]

Because Congress has spoken directly on the question at issue, its intent "is the law" and must be given effect.[43] Thus, pursuant to unambiguous congressional intent, as evidence by the language, legislative history and policies of the Act, the Commission does not have the authority to unilaterally prohibit broadcasters from offering channel packages in retransmission consent negotiations.

But even if Congress had been silent on the question at issue – which it was not – it would be unreasonable for the Commission to fill any statutory gaps in a manner that is

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[41] *Implementation of Section 207 of the Satellite Home Viewer Extension and Reauthorization Act of 2004*, Report and Order, 20 FCC Rcd 10339, 10344-45 (2005) ("SHVERA Order").

[42] *Id.* In addition, when Congress decided to impose a good faith obligation on broadcasters, it did not modify its intention to permit broadcasters to offer program packages as part of their retransmission consent negotiations. *See* Good Faith Order, ¶ 39. And when the Commission adopted the reciprocal implementing regulations in 2005, it made no substantive changes to the existing good faith standard or the two-part test and simply extended these rules to MVPDs "because Congress did not instruct us through the SHVERA to modify those rules in any substantive way . . ." SHVERA Order, ¶ 1.

[43] *Chevron U.S.A. Inc. v. Natural Resources Defense Council*, 467 U.S. 837, 842-43 (1984) ("When a court reviews an agency's construction of the statute which it administers, it is confronted with two questions. First, always, is the question whether Congress has directly spoken to the precise question at issue. If the intent of Congress is clear, that is the end of the matter; for the court, as well as the agency, must give effect to the unambiguously expressed intent of Congress"); *see also City of Cleveland v. NRC*, 68 F.3d 1361, 1366 (D.C. Cir. 1995) (court may consider legislative history in answering first *Chevron* question to determine whether Congress's intent is clear from the plain language of the statute).

contrary to the legislative history and policies underlying a statute.[44] Here, every indication of congressional intent – the text, the legislative history and policies underlying the statute – confirms that broadcasters may offer packages consisting of their broadcast channels and affiliated non-broadcast programming channels.

Moreover, the Commission cannot reverse its own regulations and rulings permitting the parties to enter into agreements providing for the wholesale packaging of broadcast and non-broadcast signals because it has not demonstrated that any changes in "competitive marketplace considerations" have occurred, as required by Section 325(b)(3)(C). The Commission has recognized that, by enacting the good faith requirement, "Congress did not intend to subject retransmission consent negotiations to detailed <u>substantive</u> oversight by the Commission."[45] Instead, Congress intended the Commission to "develop and enforce a <u>process</u> that ensures that broadcasters meet . . . in an atmosphere of honesty, purpose and clarity of process.[46] Accordingly, in carrying out Congress's directive to adopt regulations incorporating this standard, the Commission focused entirely on the process of such negotiations (rather than the substantive terms of the resulting agreements) and adopted a two-pronged test for assessing the broadcasters' good faith.[47] The Commission also stated

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[44] *See FLRA v. Aberdeen Proving Ground*, 485 U.S. 409 (1988) (rejecting agency interpretation which was contrary to the language and policies of the statute because, although "reviewing courts should uphold reasonable" interpretations of a statute, no deference is due to administrative decisions "that frustrate the congressional policy underlying a statute") (citing *Bureau of Alcohol, Tobacco & Firearms v. FLRA.*, 464 U.S. 89, 97 (1983) (same)).

[45] SHVERA Order, ¶ 3 (2005), *citing* Good Faith Order, ¶¶ 13-14 (emphasis added).

[46] Good Faith Order, ¶ 23 (emphasis added).

[47] *See* 47 C.F.R. § 76.65(b)(1) & (2). The first prong consists of a list of seven acts that violate the duty to negotiate in good faith; the second prong is a "totality of the circumstances" test.. The seven "bad" acts are refusal to negotiate; refusal to designate a representative with authority to make binding representations; refusal to meet and negotiate at reasonable times and locations; refusal to put forth more than a single unilateral proposal; failure to respond to a proposal of the other party (including the reasons for rejection of any such proposal); execution of an agreement conditioned on

that examples of bargaining proposals "presumptively . . . consistent with competitive marketplace considerations and the good faith negotiation requirement" include "proposals for carriage conditioned on carriage of any other programming, such as . . . an affiliated cable programming service, or another broadcast station in the same or a different market."[48]

The good faith negotiation obligation imposed on broadcasters and MVPDs in their retransmission consent negotiations already prohibits broadcasters from requiring only in-kind compensation and requires them to respond in good faith to proposals from MVPDs, including requests for standalone channels.[49] But the good faith standard requires only that a broadcaster be open to discussing more than one form of consideration in seeking compensation for retransmission consent; it "does not, in any way, require a broadcaster to reduce the amount of consideration it desires for carriage of its signals."[50]

To the extent the NPRM attempts to go beyond the prohibition on unilateral offers and refusals to negotiate in the Good Faith Order and seeks to prohibit packaging in general, such action would be a reversal of the Commission's prior position that packaging is permissible and that the good faith standard "does not, in any way, require a broadcaster to

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not entering into a retransmission consent agreement with any other television station or MVPD; and refusing to execute an agreement that sets forth the full understanding of the parties.

[48] Good Faith Order, ¶ 56. The Commission reiterated this conclusion in 2001. *See Carriage of Digital Television Broadcast Signals; Amendments to Part 76 of the Commission's Rules, Implementation of the Satellite Home Viewer Improvement Act of 1999*, 16 FCC Rcd 2598, 2613 (2001).

[49] *See* Good Faith Order, ¶ 43 ("[g]ood faith negotiation requires that the broadcaster accept at least some form of consideration other than carriage of affiliated programming.").

[50] *Id.; see also EchoStar Satellite Corp. v. Young Broadcasting, Inc.*, 16 FCC Rcd 15070 (2001) (noting that Commission "will not prohibit proposals of substantive terms, such as offering retransmission consent in exchange for the carriage of other programming such as a cable channel, another broadcast signal, or a broadcaster's digital signal" in denying MVPD complaint that broadcaster acted in bad faith).

reduce the amount of consideration it desires for carriage of its signals."[51] But the Commission has not demonstrated any changes in "competitive marketplace considerations," as required by Sections 325(b)(3)(C)(i) and (ii), that would justify such a reversal. Such regulation also would involve the Commission in "detailed substantive oversight" of retransmission consent negotiations, contrary to Congress's intent. Because the Commission has not demonstrated that industry practices and marketplace considerations have changed in a manner that would permit departure from the Commission's prior holdings – much less from the clearly expressed intent of Congress – a change in the Commission's position on this issue is unwarranted and indefensible.

B. The Commission Has No Authority To Preclude Wholesale Packaging Of Non-Broadcast Programming Services

The Commission also asks whether a number of statutory provisions provide a legal basis for precluding wholesale packaging of <u>non-broadcast</u> programming services.[52] None do.

First, any such authority must be premised on an immediate nexus to a means of programming <u>distribution</u> within the Commission's jurisdiction – specifically, communication by wire or radio. This nexus is absent as to the wholesale packaging of <u>non-broadcast</u> programming services at issue here, because programmers are not "engaged in the process of radio or wire transmission" when they negotiate carriage agreements with MVPDs.[53] For example, when the Commission adopted regulations implementing Congress's closed captioning mandate, it placed responsibility for compliance on "video programming

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[51] Good Faith Order, ¶ 43.

[52] NPRM, ¶¶ 126, 131-32.

[53] *American Library Ass'n v. FCC*, 406 F.3d 689, 700 (D.C. Cir. 2005).

distributors"[54] rather than on program producers, and it noted without disagreement several parties' comments that "we have never exercised direct jurisdiction over networks or producers."[55] Similarly, when Congress adopted the good faith bargaining requirements discussed above, it imposed these obligations on MVPDs and broadcast stations (i.e., program distributors), but it has not and could not extend these obligations to non-broadcast programmers. And when Congress directed the Commission in the 1992 Cable Act to adopt program access rules prohibiting unfair methods of competition in the distribution of video programming, it limited these rules to cable operators and satellite cable programming services in which a cable operator has an attributable interest (i.e., vertically integrated programmers).[56] Against this background, it is clear that none of the statutory provisions included in the NPRM's citations provides a jurisdictional basis for the Commission to intervene in the negotiations between MVPDs and non-broadcast programmers.

Second, when analyzed separately, each of the provisions cited by the Commission fails to provide the claimed authority, as shown below.

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[54] *See* 47 C.F.R. § 79.1; *Closed Captioning and Video Description of Video Programming; Implementation of Section 305 of the Telecommunications Act of 1996; Video Programming Accessibility*, 13 FCC Rcd 3272 (1997), *on recon.* 13 FCC Rcd 19973 (1998).

[55] *Closed Captioning and Video Description of Video Programming; Implementation of Section 305 of the Telecommunications Act of 1996; Video Programming Accessibility*, 13 FCC Rcd 3272, 3283 (1997), *on recon.* 13 FCC Rcd 19973 (1998) ; *see also* 47 C.F.R. § 73.658 (rules governing network-affiliate relations imposed on stations, not networks).

[56] Section 628(b), codified at 47 U.S.C. § 548(b); 47 C.F.R. § 76.1000, *et seq.* The program access rules also apply to "satellite broadcast programming vendors," i.e., satellite-delivered superstations, which are not at issue in this proceeding.

1. Section 628(b) Does Not Extend The Commission's Authority To Non-Vertically Integrated Programmers

With respect to alleged tying by satellite cable programmers, the FCC relies on Section 628(b),[57] but that section, which was adopted as part of the 1992 Cable Act, applies only to cable operators, vertically-integrated cable programmers and satellite-delivered "superstations." The limited scope of the provision was purposeful and intended to prevent cable operators and their affiliated programming services from blocking access to programming by their then-nascent MVPD competitors in order to increase competition in the video programming distribution market.[58] The provision does not provide a basis to extend program access rules to non-vertically integrated programmers, such as NBCU and other networks.[59] Congress specifically singled out a limited subset of participants in the video programming marketplace – and no others – for special program access regulation. In the absence of a clear directive from Congress, the Commission cannot unilaterally expand the scope of that statutory authority.[60] This is particularly the case here, where extending the reach of Section 628(b) to non-vertically integrated programmers would actually subvert Congress's intent by weakening the bargaining power of these non-affiliated entities vis-à-vis MVPDs.

Moreover, Section 628(b) does not preclude wholesale packaging as long as it is not accomplished in an unfair, deceptive or discriminatory manner, and the statute expressly permits the establishment of different prices, terms and conditions to take into account

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[57] 47 U.S.C. § 543(b).

[58] *See* Senate Report at 28 ("This provision is limited to vertically integrated companies because the incentive to favor cable over other technologies is most evident with them.")

[59] *See* 47 C.F.R. § 76.1002(b).

[60] *See Motion Picture Ass'n of Am. v. FCC*, 309 F.3d 796, 804-06 (2002) (vacating video description rules as beyond the authority granted to the Commission by the Telecommunications Act of 1996).

differences in the cost of creation, sale, delivery or transmission of satellite cable programming or economies of scale, costs savings or other economic benefits attributable to the number of subscribers served by the MVPD.[61]

Nor does the absence of an express statutory prohibition against extending the program access rules to non-vertically integrated programmers allow the Commission to adopt such an extension. As the U.S. Court of Appeals for the D.C. Circuit ruled in *Motion Picture Association of America v. FCC*, the courts will not presume a delegation of power in the absence of an express withholding of such power. A contrary result would give agencies "virtually limitless hegemony, a result plainly out of keeping with *Chevron* and quite likely with the Constitution as well."[62]

2. Other Statutory Provisions Cited By The Commission Do Not Provide The Necessary Legal Authority To Regulate The Substantive Terms Of Carriage Agreements

With respect to alleged tying by non-affiliated networks, the Commission relies on Sections 4(i), 201(b), 303(r), 601(6), 612(g), 616(a), and 706, but none of these provisions is applicable either.[63]

First, Section 4(i), the source of the Commission's ancillary authority, states that "the Commission may perform any and all acts, make such rules and regulations, and issue such orders, not inconsistent with this Act, as may be necessary in the execution of its functions."[64] Section 4(i), however, is not an independent basis of authority and cannot be

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[61] 47 U.S.C. § 543(c)(2)(B).

[62] *Id.*, quoting *Railway Labor Executives' Ass'n v. Nat'l Mediation Bd.*, 29 F.3d 655, 671 (D.C. Cir. 1994) (*en banc*) (concluding that *Chevron* deference is warranted only when Congress has left a gap for the agency to fill pursuant to an express or implied delegation of authority).

[63] NPRM, ¶ 132.

[64] 47 U.S.C. § 154(i).

read in isolation. Rather, the exercise of authority under Section 4(i) must be ancillary to "the Commission's effective performance of its statutorily mandated responsibilities."[65] Because Congress expressly limited the scope of the Commission's mandate in Section 628(b) to vertically integrated programmers, there is no basis on which the Commission could find that the performance of its statutory responsibilities required extension of Section 628(b) to non-vertically integrated programmers.

Indeed, the D.C. Circuit recently has reiterated that the Commission may not assert ancillary jurisdiction unless the entity it seeks to regulate is engaged in an activity within the scope of the agency's substantive statutory authority at the time the regulation is applied to that entity. Thus, in *American Library Association v. FCC,*[66] the court of appeals ruled that the Commission's adoption of "broadcast flag" regulations exceeded the agency's authority under Section 4(i) because the television receivers subject to the broadcast flag requirement would not be engaged in communication by wire or radio at the time the regulation applied, i.e., after the transmission of the broadcast signal had already been completed.

Here, the regulation similarly would be beyond the scope of the Commission's ancillary authority because the programmers would not be engaged in "communications by wire or radio" at the time the Commission seeks to apply the proposed prohibition on wholesale packaging, i.e., during the negotiation of the distribution agreement.[67]

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[65] *American Library Ass'n v. FCC,* 406 F.3d 689, 700 (D.C. Cir. 2005); *see also Motion Picture Ass'n of Am. v. FCC,* 309 F.3d at 806.

[66] *Am. Library Ass'n v. FCC,* 406 F.3d at 703.

[67] The Commission's ancillary jurisdiction in the area of cable television is further narrowed by the operation of Section 624(f) of the Act (47 U.S.C. § 544(f)), which prohibits any "Federal agency, State, or franchising authority" from imposing "requirements regarding the provision or content of cable services, except as expressly provided in [Title VI]." Because Title VI does not expressly authorize the Commission to restrict wholesale bundling, the agency's ancillary jurisdiction under Section 4(i) provides no legal basis for such action.

Second, reviewing courts have reached similar conclusions with respect to Section 303(r), which provides that "the Commission from time to time, as public convenience, interest, or necessity requires shall . . . make such rules and regulations and prescribe such restrictions and conditions, not inconsistent with law, as may be necessary to carry out the provisions of this Act . . . ."[68] As the D.C. Circuit pointedly observed in *Motion Picture Association of America v. FCC*, however, the Commission "cannot act in the 'public interest' if the agency does not otherwise have the authority to promulgate the regulations at issue. . . . The FCC must act pursuant to delegated authority before any 'public interest' inquiry is made under § 303(r)."[69] Such delegated authority over non-vertically integrated programmers is completely absent here. Moreover, as shown below, adoption of a rule precluding wholesale packaging would contravene, rather than serve, the public interest.

Third, Section 706 of the Telecommunications Act of 1996[70] likewise does not provide an independent grant of authority to the Commission to regulate package sales of non-broadcast programming. That provision instructs the Commission and the states to "encourage the deployment on a reasonable and timely basis of advanced telecommunications capability to all Americans . . . by utilizing, in a manner consistent with the public interest, convenience, and necessity price cap regulation, regulatory forbearance, measures that promote competition in the local telecommunications market, or other regulating methods that remove barriers to infrastructure investment." Even if this provision could be stretched to cover programming networks, the Commission itself has recognized that Section 706 does not constitute "an independent grant of . . . authority to employ other

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68 47 U.S.C. § 303(r).

69 *Motion Picture Ass'n of Am. v. FCC*, 309 F.3d at 806 (emphasis original).

70 *Codified* at 47 U.S.C. § 157.

regulating methods. Rather, . . . section 706(a) directs the Commission to use the authority granted in other provisions . . . to encourage the deployment of advanced services."[71] Because the Commission has not been granted the authority to regulate non-vertically integrated programming networks in any provision of the Act, Section 706 is of no relevance.

Fourth, Section 201(b), which authorizes the Commission to "prescribe such rules and regulations as may be necessary in the public interest to carry out the provisions of this Act," does not provide the source of authority for the Commission's proposed actions. This provision of the Act is contained within Title II, which focuses exclusively on common carriers – a classification that unquestionably does not apply to the non-broadcast programmers in question. Moreover, the Supreme Court has recognized that while Section 201(b) gives the Commission authority to "carry out the provisions of this Act," the provision does not allow the Commission to regulate in areas in which it has not been given express authority to act.[72]

Finally, none of the three provisions from Title VI (Cable Communications) gives the Commission authority to prohibit packaged offerings by non-broadcast programmers in wholesale negotiations. Section 601(6) is merely a statement of congressional purpose "to promote competition in cable communications and minimize unnecessary regulation that would impose an undue economic burden on cable systems." A statement of purpose, while reflective of Congress's intent in adopting a statute, does not by itself constitute a source of delegated authority to a regulatory agency. Moreover, there could be no justification for regulatory intervention because the Commission has not demonstrated that wholesale

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[71] *Deployment of Wireline Services Offering Advanced Telecommunications Capability*, 13 FCC Rcd 24011, 24044 (1998).

[72] *AT&T Corp. v. Iowa Utilities Board,* 525 U.S. 366, 381 n.7 (1999).

packaging harms competition in cable communications, and the marketplace practice of wholesale packaging is certainly not a "regulation that would impose an economic burden on cable systems."

Section 612(g) does give the Commission authority to adopt "additional rules necessary to provide diversity of information sources," but this provision is triggered only if cable penetration has reached 70 percent of the households passed by cable systems with at least 36 activated channels. As the Commission concluded at its open meeting in November 2007, however, that threshold has not yet been reached.[73] Moreover, if and when the Commission determines that the 70 percent threshold has been met, the Commission's rulemaking authority under Section 612(g) is limited to the context of leased access channels, which is the sole focus of Section 612.

The final section cited by the Commission, Section 616(a), provides protections for video programming vendors against abuses by MVPDs, such as demands by MVPDs for an equity ownership interest in a programming service and for exclusivity against other MVPDs as conditions of carriage.[74] Because this provision focuses on the rights of programmers vis-à-vis MVPDs, it cannot be twisted to impose burdens on the protected parties (the programmers) in the form of restrictions on sales of packaged channels.

In sum, none of the provisions cited by the Commission in the NPRM confers on the agency the authority to regulate non-vertically integrated programmers and in particular to

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[73] *See* News Release, "FCC Adopts 13th Annual Report to Congress on Video Competition and Notice of Inquiry for 14th Annual Report," at 3 (released Nov. 27, 2007) ("13th Annual Report") (available at http://hraunfoss.fcc.gov/edocs_public/attachmatch/DOC-278454A1.pdf); *see also* Statement of Comm'r Robert M. McDowell on 13th Annual Report (dissenting in part) (available at http://hraunfoss.fcc.gov/edocs_public/attachmatch/DOC-278454A6.pdf) (recounting background underlying determination whether 70 percent household test had been achieved).

[74] 47 U.S.C. § 536(a).

prohibit these parties from offering their programming services to MVPDs in wholesale packages.

C. A Prohibition On Wholesale Packaging Would Be Inconsistent With The First Amendment

Nor could the FCC prohibit wholesale packaging consistent with the First Amendment. The Commission asks in the NPRM whether "action to preclude tying arrangements is consistent with the First Amendment."[75] The Commission invokes the Supreme Court's decision in *Hurley v. Irish-American Gay, Lesbian and Bisexual Group of Boston*[76] to suggest that the First Amendment does not protect broadcasters' combined offerings of broadcast channels and non-broadcast programming channels[77] and in so doing misstates the Court's ruling in *Hurley.* When the Court in *Hurley* referred to "individual, unrelated segments that happen to be transmitted together," it was <u>not</u> referring to packaging of channels by content creators such as the programmers at issue in this proceeding; rather, it was referring to the carriage of unrelated broadcast channels by cable operators under the must-carry provision of Section 325(b)(3)(B). Distinguishing carriage of must-carry signals by cable operators from the editorial judgments exercised by newspaper editors, the Supreme Court in *Hurley* viewed cable operators as a "conduit" for these must-carry channels rather than as speakers or editors of content chosen by the operators, and thus the First Amendment permitted more interference with the way in which cable operators offered these broadcast channels.

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[75] NPRM, ¶ 128.

[76] 515 U.S. 557 (1995).

[77] NPRM, ¶ 128.

In contrast, the programmers in this proceeding are content creators, not simply conduits for content created by others. Thus, their editorial decision to "bundle" programs and channels is constitutionally protected speech indistinguishable from newspapers' bundling of sections and authors' bundling of essays or short stories. And the Supreme Court has recognized that even cable operators exercise "a significant amount of editorial discretion regarding what their programming will include"[78] and that their communication "implicates protected speech."[79] Accordingly, the Commission may not burden the programmers' constitutionally protected speech without first meeting the exacting standard imposed by the First Amendment. This it fails to do, because the Commission's means are not "narrowly tailored to serve a compelling" interest:[80]

First, a governmental interest in prohibiting wholesale packaging cannot be compelling because it is inconsistent with congressional intent, which expressly allows such transactions.

Second, while a governmental interest in prohibiting "tying" may be compelling, the Commission has failed to demonstrate that such interest is implicated here. The NPRM establishes <u>none</u> of the elements required for a tying violation under the antitrust laws. Because "a governmental body seeking to sustain a restriction on . . . speech must demonstrate that the harms it recites are real,"[81] the Commission cannot rely, consistent with the First Amendment, on hypothetical harms that it has posited but failed to demonstrate.

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[78] *FCC v. Midwest Video Corp.*, 440 U.S. 689, 707 (1979).

[79] *Los Angeles v. Preferred Communications, Inc.*, 476 U.S. 488, 494 (1986).

[80] *Consol. Edison Co. v. Public Serv. Comm'n*, 447 U.S. 530, 534 (1980).

[81] *Edenfield v. Fane*, 507 U.S. 761 (1993).

In addition, the Commission's failure to even attempt to make out a case of "tying" with the rigor required by the relevant antitrust laws "'undermines the likelihood of a genuine [governmental] interest' in preventing" tying.[82] Because the Commission lacks a "genuine" interest, the regulations proposed by the NPRM cannot be said to "serve" or advance the Commission's purported interest.

Moreover, the means selected by the Commission here are more restrictive than necessary to serve its purported interest in preventing "tying" because, among other failings, the Commission makes no attempt to limit its regulatory reach to behavior that constitutes "tying" under the antitrust laws and includes perfectly legal conduct within its regulatory scope. For example, the Commission has not, and could not, establish any of the elements, such as market power, required to establish a violation of the antitrust laws. This overbroad regulatory approach violates the First Amendment. As the Supreme Court explained in *FCC v. League of Women Voters*, a regulation or law that includes "within its grip a potentially infinite variety of speech, most of which would not be related in any way to" the asserted interest (here, illegal tying), "is not sufficiently tailored to the harms it seeks to prevent."[83]

IV. THE HARMS ENVISIONED BY COMMISSION ARE ILLUSORY, AND THUS ANY REMEDY FASHIONED TO ADDRESS SUCH HARMS CANNOT BE JUSTIFIED

Even assuming the Commission has the power to address antitrust violations, it has not attempted to do so here. In fact, the Commission completely eschews the rigors of antitrust law with respect to tying, failing to address the applicable law and its requirements.

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[82] *FCC v. League of Women Voters*, 468 U.S. 364, 396 (1984).

[83] 468 U.S. 364, 393 (1984).

For example, the Commission has not even acknowledged that a review of alleged tying must start with a market analysis that defines the two distinct product markets at issue – the tying product market and the tied product market. The Commission instead assumes its conclusion (that tying does indeed occur), a conclusion from which it then derives two specific "harms" allegedly suffered by MVPDs and consumers:

> First, the MVPD can refuse the tying arrangement, thereby potentially depriving itself of desired, and often economically vital, programming that subscribers demand and which may be essential to attracting and retaining subscribers. Second, the MVPD can agree to the tying arrangement, thereby incurring costs for programming that its subscribers do not demand and may not want, with such costs being passed on to subscribers in the form of higher rates, and also forcing the MVPD to allocate channel capacity for the unwanted programming in place of programming that its subscribers prefer. In either case, the MVPD and its subscribers are harmed by the refusal of the programmer to offer each of its programming services on a stand-alone basis.[84]

The Commission, however, has failed to demonstrate a factual predicate for either of these harms. Indeed, as shown below, such factual predicate is completely lacking. First, the conduct described by the Commission – take-it-or-leave-it negotiating for fixed packages of programming networks – does not occur. Nor has the Commission offered any evidence – beyond mere presumptions in the NPRM – of consumer harm stemming from the wholesale packaging of programming. Further, no supplier of video programming possesses the level of market power in the alleged tying product market that would justify a tying charge (assuming, of course, that a separate market for the tied product could be shown, which it cannot). Finally, because wholesale packaging reduces programming costs and increases programming diversity, any remedy imposed by the Commission would not promote competition or benefit consumers, as required by sound economic and antitrust

[84] NPRM, ¶ 2.

policy, but instead would harm consumers by diminishing program diversity while increasing costs. Accordingly, the harms posited in the NPRM are illusory and there is no justification for the Commission to attempt to regulate the substantive terms of carriage agreements.

A. The Statistical Evidence Shows That Programmers Do Not Sell Only In Packages

The evidence demonstrates that the "tying arrangements" and "take-it-or-leave-it" negotiations described by the Commission do not occur or, at the very least, that programmers do not have the market power to succeed in any potential tying attempts. This evidence is presented in the statistical analysis of the carriage patterns of non-broadcast cable networks (including those owned by NBCU) prepared by Dr. Bruce Owen (attached hereto)[85]and in testimonial evidence provided to Dr. Owen by Fox, NBCU and Viacom regarding their negotiation and sales policies and practices.

Fox, NBCU and Viacom each provided to Dr. Owen data concerning the carriage of their non-broadcast programming networks by individual cable operators and other MVPDs. Dr. Owen also had access to publicly available data compiled by Warren Communications on dozens of networks owned by numerous programmers and carried by a large number of cable systems. Dr. Owen analyzed these data to determine whether they support the allegation that programmers give MVPDs "take-it-or-leave-it" offers that require the operators to take a fixed package of the programmers' networks.[86] As explained in detail below, the data reveal widely divergent carriage patterns – including among small cable

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[85] *See* Bruce M. Owen, "Wholesale Packaging of Video Programming" (attached hereto as Exhibit B) ("2008 Owen Report").

[86] *See id.* at 11-25. In his analysis, Dr. Owen focused on nationally distributed basic cable networks launched prior to 2004. Non-English language networks also offering English language networks were not included in the study. Thus, the study excluded NBCU's Chiller, Sleuth, Universal HD and mun2 networks, none of which have the level of subscriber penetration achieved by such networks as USA, MSNBC, CNBC or Bravo.

operators – that contradict the Commission's presumption that programmers engage in "all or nothing tying" in their negotiations and agreements with MVPDs.

With respect to NBCU, Dr. Owen examined the carriage patterns among 1,402 MVPD operators and/or systems for six non-broadcast networks owned by NBCU: Bravo, CNBC, CNBC World, MSNBC, Sci Fi and USA (the "NBCU networks"). His analysis revealed that 18 percent of the MVPDs taking any NBCU network take only a single NBCU network. Only two percent of the MVPDs took all six of the networks.

Because the NPRM focuses on the claims of small cable operators that programmers require them to accept fixed packages of programming channels, Dr. Owen also examined a subset of the NBCU data, focusing only on the carriage patterns of small MVPDs[87] that carry at least one NBCU network, but that do not contract for any NBCU networks through the National Cable Television Cooperative ("NCTC").[88] Based on this examination, Dr. Owen concludes that it is unusual for any of these small operators to take more than one or two of the six NBCU networks studied. Almost 50 percent take only one network, and an additional 35 percent take only two networks. Not one of the six networks is carried by all of the small operators, and the highest carriage rate for a single network – USA Network (the highest rated basic cable network in the U.S.) – is only 59 percent.[89] According to Dr. Owen, this

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[87] For this purpose, Dr. Owen restricted the data to systems owned by MSOs with fewer than 400,000 subscribers, the threshold applied by the Commission to delineate small cable systems. *See* 2008 Owen Report at 15, 19 & nn.10, 13.

[88] *See infra* at pp. 40-41 (discussing NBCU's negotiations with NCTC for carriage of NBCU's non-broadcast networks).

[89] Similar results were obtained in the analyses of Viacom's and Fox's carriage patterns. *See* 2008 Owen Report at 11-13 (Viacom) and 14-17 (Fox).

empirical evidence supports NBCU's testimonial evidence[90] that it does not make "take-it-or-leave-it" offers or require MVPDs to take networks they do not wish to take.[91]

Dr. Owen's analysis based on the publicly available Warren Communications data also provides "striking evidence" that programmers do not make "take-it-or-leave-it" offers requiring cable systems to take fixed packages of networks.[92] Dr. Owen analyzed the carriage patterns of 94 networks owned by 14 different programming groups, including Fox, NBCU and Viacom. These data revealed that it is uncommon for a cable system to carry all of the networks offered by a programmer. The highest percentage of cable systems taking all of the networks offered by a particular programmer is 46 percent – for the four acclaimed and popular networks offered by A&E included in the Warren study – Biography, History, History International and A&E. Most of the other programmers experienced much lower percentages – generally under five percent – of cable system take-up of all of their networks.[93] These data also showed that programmers sell their networks in many different combinations and on a standalone basis.

Dr. Owen also screened these data to focus on systems owned by small operators. The results were even more pronounced – among small operators, it is even more uncommon for a system to carry all of the networks offered by a programmer. Apart from the four A&E networks and the four networks owned by Cablevision, no programmer has all of its networks carried by as many as five percent of small operators' systems. Anticipating the argument that these small systems may not take all of the networks offered by a

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[90] *See* Exhibit C (attached).

[91] 2008 Owen Report at 17.

[92] *Id.* at 21-25.

[93] *Id.* at 22 & Fig. 11.

programmer because they are capacity-constrained, Dr. Owen performed the same analysis on systems owned by small operators that offer a digital tier and receive at least 60 satellite-delivered networks. Not surprisingly, these systems tend to take a larger percentage of a programmer's offerings, but still tend not to take all of the networks offered by a programmer. Indeed, in this analysis, there was only one programmer from which over 50 percent of these systems took all of the networks – again, the four networks offered by A&E. Dr. Owen concludes from these data that small operators' systems with substantial channel capacity show considerable diversity in their carriage patterns and that this diversity of carriage patterns among small operators is inconsistent with the conclusion that wholesale programmers engage in "all or nothing tying."[94]

B. Dr. Owen's Conclusions Based On Empirical Data Are Consistent With The Testimonial Evidence From NBCU And Others That Programmers Do Not Engage In "Take-It-Or-Leave-It" Negotiations With MVPDs

NBCU takes seriously its good faith obligations under the Act and the Commission's rules. Compliance with these obligations is both required by law and good business practice. As described in the attached declaration of Henry Ahn, Executive Vice President of NBCU's TV Networks Distribution Division,[95] NBCU's negotiations with MVPDs are guided by the principle and perspective that each MVPD is a customer, not an adversary, and that the agreement reached by the parties should be mutually beneficial. NBCU's MVPD customers need content that will attract subscribers, and NBCU needs distribution outlets for its content. These goals

[94] *Id.* at 23-24.

[95] Attached hereto as Exhibit C. This description of NBCU's negotiations and sales practices responds to the Commission's request in the NPRM for information on the "current status of carriage negotiations in today's marketplace." NPRM, ¶ 125.

would not be served by "take-it-or-leave-it" negotiating, and NBCU does not engage in such tactics.

As explained in Mr. Ahn's declaration, the NBCU sales team works hard to develop strong and positive relationships with MVPDs. This is a constant process involving ongoing dialogue between the sales team and the MVPD representatives about NBCU's various products, including the established linear networks (such as USA, MSNBC and CNBC), the newer linear networks (such as Chiller, Sleuth, Universal HD and now Oxygen) and a variety of non-linear products, including FOD, VOD and other broadband content.

When formal negotiations commence for a new agreement – whether to replace an expiring agreement, to offer a new service or product or to enter into an agreement with a new MVPD – NBCU generally starts the process by submitting a written proposal that includes all of the linear cable networks and non-linear products and services, as well as special programming opportunities for the MVPD customer, such as NBCU's Olympics coverage. The written proposal sets forth proposed per-subscriber rates separately for each linear cable network. These rates are based on a number of factors, including NBCU's assessment of the fair market value of each network and the number of subscribers to whom the MVPD will commit to deliver the network ("penetration levels").

The operators typically respond with a counterproposal that may seek to adjust the rates, the number of networks to be carried, the penetration levels or all of these elements. The obligation then falls on NBCU to develop a revised proposal that may include such adjustments and may also include a number of other inducements to come to an agreement. This back-and-forth process – which may involve numerous cycles and is the polar opposite of "take-it-or-leave-it" negotiation – is typical of NBCU's negotiations with MVPDs.

For MVPDs operating in one or more of the 10 markets served by NBCU owned and operated stations, the proposal also includes retransmission consent for those stations.[96] Beginning with the initial round of retransmission consent negotiations in 1993, however, MVPDs have made clear to NBCU that they do not want to see a separate, per-subscriber cash rate set forth for the right to carry the NBCU owned stations. Therefore, for agreements covering one or more of these 10 markets, NBCU includes the value of the station(s) in the proposed rates for the other services. NBCU has been asked very rarely to break out the rates for the broadcast stations and offer a standalone cash price for retransmission consent. Upon such request by an MVPD, NBCU has been (and is) willing to negotiate separately for retransmission consent at a rate that fairly reflects the market value of those channels.

NBCU is also willing to offer its non-broadcast networks on a standalone basis (except with respect to the HD simulcast versions of its SD networks) if requested by the operator at a rate that reflects the market value of those networks on a standalone basis. However, NBCU will offer incentives to MVPDs who agree to carry multiple networks in order to gain broader distribution for the networks. These incentives typically take the form of a discount on the rates for the most popular networks and occasionally marketing or other launch support for the newer networks.

The penetration level for each network is a key negotiating point, because all of NBCU's linear networks are advertiser-supported, and ad rates are based on potential

[96] NBCU does not negotiate for MVPD carriage of the approximately 200 non-owned NBC network affiliated stations.

viewers (i.e., number of subscribers) rather than actual viewing. Broader carriage of the networks therefore results in increased advertising revenues, which in turn helps to keep down per-subscriber costs. Although NBCU would prefer to have each of its networks distributed to the largest possible audience, which generally means the most widely subscribed tier, the sales team is not always able to achieve this goal in all negotiations. As a result, some of the NBCU networks are carried on the most widely subscribed tiers, while others are not. The empirical evidence gathered by Dr. Owen confirms that not all of the NBCU networks are carried by all of the MVPDs with which NBCU has distribution agreements, and a large number of cable operators carry only one or two NBCU networks.

NBCU currently has carriage agreements in place with the National Cable Television Cooperative ("NCTC"), the national cooperative purchasing organization for small and medium-sized cable operators.[97] As NCTC explains on its website, through joint purchasing and negotiation, NCTC functions like a multiple system cable operator by negotiating and administering master affiliation agreements with programming networks on behalf of its more-than 1,000 member companies, which allows it to take advantage of volume discounts and pass on the cost savings to its members. These member companies operate more than half of the franchised cable systems in the United States and serve a total of 12 million subscribers, which gives NCTC enormous buying power and substantial clout in its negotiations with programmers. Indeed, if all of NCTC's current member companies were owned by a single MSO, it would have ranked as the fourth largest MVPD in the United States at the time of the Commission's Twelfth Annual Video Competition Report.[98] Because most

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[97] http://www.cabletvcoop.org/abouts.asp

[98] *Compare* http://www.cabletvcoop.org/abouts.asp *with* 12th Annual Video Competition Report, 21 FCC Rcd 2503 at Appendix B, Exhibits B-1 & B-3 (2006) (noting that NCTC's members serve more than

of NCTC's members are not located in the NBCU owned station markets, retransmission consent is not part of the current agreement with NCTC.

After NBCU and NCTC reach agreement on a master agreement, NCTC invites its members to sign on to the agreement. There is no obligation to do so, however, and although the vast majority of members do sign on to the master agreement, some do not and prefer instead to negotiate directly with NBCU. In such cases, NBCU negotiates in good faith to reach separate agreements with these operators. With respect to NCTC agreements that cover more than one of NBCU's networks, a member who signs on to such an agreement may pick and choose which of those networks to carry and will be subject to the NCTC-negotiated terms and conditions applicable to those networks it chooses to carry. In addition, NBCU negotiates separately for retransmission consent with the small number of NCTC member companies operating in NBC owned station markets. As with the larger MSOs, these operators do not want to pay cash for the right to retransmit the NBCU stations' broadcast stations. Therefore, NBCU negotiates for various forms of in-kind consideration, such as an agreement to move an existing network to a more favorable tier or to carry a new network not covered by a NCTC master agreement.

Other major programmers apparently take similar approaches. For example, a representative of The Walt Disney Company, Ben Pyne, testified before the Senate Commerce, Science and Transportation Committee in January 2006 that Disney does not condition the carriage of its most popular services (including the ABC owned and operated television stations) on the carriage of any other services or networks owned by Disney and that Disney offers "tremendous flexibility" in the forms of compensation that it is willing to

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12 million subscribers and that fourth-largest MVPD as of June 2005 had 11.0 million subscribers – or 11.69% of the nation's 94.2 million MVPD subscribers).

accept.[99] Dr. Owen also confirms that, based on interviews of responsible personnel at Fox and Viacom, these programmers do not offer MVPDs fixed bundles of networks on a "take-it-or-leave-it" basis.[100] Even if such all or nothing tying did take place, however, it would warrant regulatory intervention only if it were used by entities with market power to foreclose competition in the video programming market, which, as shown below, is not the case here.

C. The Video Programming Market Is Highly Competitive

The evidence summarized above demonstrates that, as a factual matter, programmers do not engage in "all or nothing tying" arrangements with MVPDs. Dr. Owen's report also demonstrates that a tying charge is unwarranted because the industry that supplies video programming services at wholesale to MVPDs has a competitive structure in which no single supplier has market power.

1. No Single Supplier Of Video Programming Has Market Power, And There Are Many New Entrants

A necessary (but not sufficient) condition in antitrust analysis for tying to be regarded as potentially harmful to consumers is that the seller has market power in the tying product and uses that power to foreclose competition in a separate and distinct market for the tied product.[101] As a threshold matter, there are not two product markets here. Rather, there is a single market for the sale of video programming. Therefore, foreclosure of competition in a separate tied product market does not occur. Nor does any program supplier in the single

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[99] Statement of Ben Pyne, President, Disney and ESPN Networks Affiliate Sales, before the Senate Committee on Commerce, Science and Transportation at 2-3, CQ Congressional Quarterly (Jan. 31, 2006) (available on Lexis) ; *see also* Declaration of Benjamin N. Pyne, attached to *ex parte* letter submitted Sept. 10, 2007, in MB Docket No. 07-29, by Susan L. Fox, The Walt Disney Company.

[100] 2008 Owen Report at 10.

[101] *See, e.g., Jefferson Parish Hosp. Dist. No. 1 v. Hyde*, 466 U.S. 2, 17-18 (1984).

market for the sale of video programming possess market power. In the context of tying, a market share of 30 percent is not sufficient to infer market power. As Dr. Owen demonstrates, no supplier of video programming to MVPDs has as much as 25 percent of that business, and there is ample evidence of new entrants into the market. Both of these factors are indicative of a competitive market.[102]

To support his conclusion regarding the absence of market power, Dr. Owen examined market share information for eight leading programmers. This examination included share of networks, share of subscribers, share of basic cable full day audience, share of basic cable prime time audience and share of basic cable network revenue. Based on share of networks, Viacom, the programmer with the largest number of networks, has only about eight percent of the total networks studied. Dr. Owen acknowledges that this simple count of networks does not reflect that some networks are larger than others. Even when network size is measured by the number of subscribers, viewers and revenues, however, none of these measures indicates that any programmer has as much as 25 percent of viewers or sales, and none exceeds 15 percent in number of subscribers.[103] In short, according to Dr. Owen, "[n]one has a share that is even close to the levels that are commonly associated with market power."[104]

Even the presence of market power, standing alone, is not sufficient to trigger scrutiny under the antitrust laws unless that market power is used to force a purchaser to do something that he or she would not do in a competitive market and where the effect is to

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[102] 2008 Owen Report at 25-27.

[103] *Id.* at 25-27 & Fig. 14.

[104] *Id.* at 27.

foreclose competition in the market.[105] The frequency with which new programmers enter the market and new networks are introduced reflects that the market for video programming is highly competitive and that new entrants are not foreclosed. According to the 2008 Owen Report, 134 new basic national cable networks were introduced between 2000 and 2007, accounting for 44 percent of the total 301 basic national cable networks identified in the Commission's Twelfth Annual Report on the Status of Competition in the Market for the Delivery of Video Programming.[106] Of the 134 new networks, 69 – more than 50 percent – were introduced by "unaffiliated" programmers (i.e., programmers owning no other networks). According to Dr. Owen, these figures demonstrate a lack of market foreclosure, based on the active entry of new providers into video programming network sales and active expansion of the number and variety of networks offered to MVPDs.[107]

Dr. Owen also examines the competitiveness of the market for the sale of video programming by considering the degree of concentration in this market under the Herfindahl-Hirschman Index ("HHI"). Based on the HHI standards for concentration applied by the U.S. Department of Justice and the Federal Trade Commission, the market for the sale of video programming measured by the number of networks or the number of subscribers would be considered unconcentrated. When measured by revenue or viewers, the market for the sale of video programming would be in the middle to low end of the moderately concentrated range, although, as Dr. Owen explains, the measures he used probably exaggerate the degree of concentration because they exclude certain categories of video content not currently purchased by MVPDs, such as the growing category of video content

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[105] *See Jefferson Parish Hosp. Dist. No. 1 v. Hyde*, 466 U.S. 2, 13-14 (1984).

[106] 21 FCC Rcd 2503 (2006).

[107] 2008 Owen Report at 27-28.

provided over the Internet. He concludes that "each of these measures shows an industry structure consistent with a high degree of competition."[108]

The presence of competition in a market imposes discipline on all providers with respect to price, quality and the terms on which products are sold. A provider who attempts to charge a price that is higher than warranted by the quality of its products will drive its customers to alternative products supplied by rival firms.[109] Competition also forces firms to provide a level of quality that will attract and retain customers who would otherwise purchase from rivals. Similarly, in a competitive market, a supplier is constrained in the terms of sale it can require because rival firms can attract customers by offering more favorable terms of sale. In short, in the U.S. economy, competition is relied upon to ensure that customers receive the products, quality, prices and terms they desire, consistent with the costs of the firms supplying the products.[110] According to Dr. Owen, these principles apply fully to the wholesale video programming market, and, given the competitive nature of that market in the U.S., "there is no apparent reason for the Commission to be considering departing from the market solution in the sale of video programming networks."[111]

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[108] *Id.* at 27. Since the early 1990s, programming options for consumers have tripled. According to Nielsen data, the average television household had access to 104.2 channels in 2006 as compared to only 33.2 channels in 1990. *See, e.g.*, http://www.nielsenmedia.com/nc/portal/site/Public/menuitem.55dc65b4a7d5adff3f65936147a062a0/?Vgnextoid=48839bc66a961110vgnvcm100000ac0a260arcrd (last viewed Jan. 3, 2007).

[109] 2008 Owen Report at 28.

[110] *Id.*

[111] *Id.*

2. The Commission's Concept Of "Must Have" Or "Marquee" Programming Has No Basis In The Act And Is Not Supported By Economic Principles Or Data

In a competitive marketplace, a seller should be able to charge a higher price for a popular (or "marquee") network. In addition, if a seller wants to encourage an MVPD to carry a new, less established or less popular network, it should also be able to do so by charging a lower price for the more popular programming as an inducement to carriage of the less popular network. Not only does such behavior reduce any incentive for tying in the first place, but such behavior is fully permissible under the applicable laws. The Commission has not demonstrated otherwise. Instead, in an attempt to prohibit this behavior – while avoiding the rigors of antitrust law – the Commission relies on the concept of marquee or must-have programming. But those concepts are no substitute for the rigorous market power analysis that the Commission must perform under antitrust law – an analysis that the Commission has not even attempted here.

Such a rigorous analysis would have shown, as Dr. Owen also demonstrated, that none of the particularly desirable programming constitutes a separate relevant market in antitrust terms because MVPDs can substitute other programming of lesser effectiveness in attracting subscribers at less cost and adjust their own prices accordingly, which acts as a competitive constraint on the price that can be charged for the most desirable programming.[112]

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[112] 2008 Owen Report at 29-30. The Commission purports to offer an empirical analysis of the issue of "must have" programming by studying the effect of exclusivity in the licensing of regional sports networks ("RSNs") to independent MVPDs in two cities. The study has been criticized by others on methodological grounds. According to Dr. Owen, however, the major drawback of the study is that it does not test the correct hypothesis. While the Commission examined whether having a particular RSN reduces market share, this is quite different from determining whether RSNs or any other programming networks are essential. The issue is whether MVPDs can compete, not whether they can obtain the same market share. *Id.* at 32.

By embracing the concept of "must have" or "marquee" programming, the Commission improperly disregards the discipline imposed on sellers in a competitive market with respect to quality, price and terms of service and the willingness of buyers to consider alternatives when they are dissatisfied with the quality, price or terms being offered. Instead, the Commission appears to believe that "must have" programming is "essential" for viable competition among MVPDs[113] – a concept that has no basis in the Act, no basis in empirical evidence or economic analysis and no definable boundaries:

> Effective competition is not like golf, where poor players get handicaps. . . . Few if any MVPDs are likely to go out of business as effective competitors for lack of a particular network; instead, they will simply adjust other programming choices, prices and marketing strategy. . . . A "must have" network, as that term appears to be used, is simply a network that makes an MVPD more profitable than otherwise, given its other carriage choices and the price it would like to pay for the network. It is quite unlikely that the second-most-profitable set of carriage and pricing decisions is strikingly less profitable.
>
> . . . Most households watch multiple cable networks. It seems implausible that the loss of a single network that is part of a multi-channel line-up would make an MVPD completely undesirable to a large number of consumers. Even if that were the case, the MVPD has an opportunity to add alternative programming in place of the network that was dropped. It does not matter whether or not this alternative programming is a "close substitute" that will attract the same subscribers who were induced to leave. The MVPD is just as well off having new subscribers who are attracted by the alternative programming or by the lower subscription fees that the MVPD is able to offer by eliminating the programming fee to the dropped network.[114]

Indeed, the Commission's notion of what constitutes "must have" programming – relative popularity – would convert virtually every differentiated product in our economy into a "must have" essential facility.[115] The absurdity of this notion is highlighted by the very

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[113] NPRM, ¶ 119.

[114] 2008 Owen Report at 30.

[115] *Id.* To the extent the Commission intends to rely on the essential facilities doctrine, either directly or by analogy, it is clearly inapplicable in the context of the wholesale market for video programming. The Supreme Court in *Verizon Communications, Inc. v. Law Offices of Curtis V. Trinko, LLP*, 540 U.S. 398, 410-11 (2004), questioned the viability of this "doctrine crafted by some lower courts." In any

example of "must have" programming cited by the Commission: "The Sopranos," a single, limited-duration series.[116] First, the network on which "The Sopranos" ran, HBO, is a premium cable channel which requires each subscriber to opt in. Fewer than 29 million U.S. households – less than 30 percent of all U.S. households – chose to have access to any of HBO's programming by subscribing to the network during the second quarter of 2007.[117] Second, according to ratings data cited in the 2008 Owen Report, more than 90 percent of the television audience – and over two-thirds of those who subscribe to HBO – did not watch "The Sopranos." And yet the Commission characterizes this programming as "must have."

Although the Commission chose for its example the most popular program on cable television during the 2007 season, its example demonstrates both how indefinable a term like "marquee" programming is and how fragmented today's television audiences are, with their wealth of programming choices.[118] According to Dr. Owen, for the week of April 9,

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event, using marquee programming to encourage MPVDs to take less desirable programming could not possibly fit within the doctrine for several reasons. Most importantly, it requires control of an essential facility by a monopolist. For all the reasons set out in these comments and in the 2008 Owen Report, there is no monopolist here. It also requires denial of access to the facility. While this can be satisfied with "constructive denial," the data in the 2008 Owen Report and the declaration of Mr. Ahn show that there is no denial, actual or constructive, here.

[116] *See* NPRM, ¶ 38.

[117] *See* Andrew Wallenstein and Steven Zeitchik, "Post-'Sopranos,' HBO subs not out of whack," Hollywood Reporter (Nov. 26, 2007) (available at http://www.hollywoodreporter.com/hr/content_display/news/e3i383cb32713bee668c2d1f5610316a96c) (last viewed Jan. 3, 2008) (citing SNL Kagan data).

[118] Without a clear antitrust or economic foundation, a hypothetical product market consisting of "must have" programming is impossible to define in a clear and rational manner. A premium channel, such as HBO, cannot be "must have" when tens of millions of MVPD households voluntarily choose not to subscribe to the channel. Nor can an individual series or program on that channel be singled out for "must have" status if such a characterization would require the channel owner to offer that series or program on a standalone basis. *See* Part III(C) *supra*. Sports programming, which the Commission has suggested may be "must have" in some cases, also is the sort of programming that major cable operators have voluntarily declined to carry, as in the recent example of the NFL Network. *See, e.g.*, "NFL Network Wooing Cablers" (Nov. 20, 2007) (http://www.variety.com) (last viewed Nov. 21, 2007).

2007, "The Sopranos" was the highest rated show on cable with 7.42 million viewers. The second and third most popular shows were episodes of "SpongeBob" on Nickelodeon and "WWE Raw" on USA, with 5.9 million and 5.7 million viewers, respectively. The next three most popular programs were episodes of "Charm School," "I Love New York – Reunion," both on VH1, and another episode of "WWE Raw," each with about 5 million viewers.[119] It is doubtful the Commission would label any of these programs as "must-have" even though the ratings demonstrate they are popular with viewers.

Moreover, consumers are no longer limited to "traditional" MVPDs for access to particular programming. Many sports leagues and broadcast networks make programming readily available over the Internet, and much of that programming is offered to consumers at no charge.[120] According to a new-media survey conducted by Deloitte & Touche, 38 percent of all consumers are watching television shows online, an increase of 15 percent over a survey conducted just eight months earlier.[121] As the digital transition moves forward,

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[119] 2008 Owen Report at 31.

[120] Many traditional programmers, including television broadcasters and cable networks, also have begun to offer streaming video on their websites to stimulate and supplement viewing of their television offerings, including previews of new series and simulcasts of news programs. AT&T recently announced plans to introduce a streaming television service for subscribers with broadband access, which will initially offer 20 channels of programming. *See* Leslie Cauley, AT&T to Stream TV to Net Users, USA Today, Sept. 12, 2006, http://www.usatoday.com/tech/products/services/2006-09-11-att-streaming-tv_x.htm. Free or fee-based downloadable television programs, including news broadcasts, now give viewers additional options for choosing the time, place and manner of viewing the programs they want to watch. Digital video recorders, which have experienced phenomenal growth, also allow consumers to control the timing of their television viewing. *See 12th Annual Video Competition Report*, 21 FCC Rcd at 2530, ¶¶ 58-59. And broadband access is clearly the game-changer in the video programming market: Almost as many homes – approximately 55 percent of all U.S. households by the end of 2007 – are expected to have broadband Internet access as now subscribe to cable. *See* http://www.internetworldstats.com/usage/use011.htm (last viewed Nov. 20, 2007); http://www.ncta.com/ContentView.aspx?contentId=54 (projecting cable penetration of 58.3% of U.S. households as of June 2007) (last viewed Nov. 20, 2007).

[121] "Auds More Wired, Survey Finds," The Hollywood Reporter (Dec. 28, 2007) (reporting on a survey to be released in January 2008).

consumers also will be able to access greater quantities of free, over-the-air multicast programming as well, such as NBC WeatherPlus and other local programming.

V. WHOLESALE PACKAGING BENEFITS MVPDS AND CONSUMERS BECAUSE IT DECREASES PROGRAMMING COSTS AND INCREASES PROGRAMMING DIVERSITY, THEREBY ACHIEVING IMPORTANT COMMISSION OBJECTIVES

One of the principal economic motivations for wholesale packaging of program channels is that it allows programmers to benefit from economies of scale and scope, thereby reducing the costs to produce, market and distribute the programming. Commonly owned networks can use the same facilities and personnel to produce programming, thereby spreading high, fixed production costs over more channels. The same marketing and sales teams can promote and distribute all of the commonly owned networks. Wholesale packaging also allows program producers to share these benefits with their MVPD distributors by offering a price for a program package that is lower than the aggregate price if each channel were purchased separately.

Wholesale packaging also helps programmers to launch and distribute new programming services, which promotes greater competition among programmers and substantially increases program choices for consumers. As explained by NBCU's Executive Vice President for TV Networks Distribution in the attached declaration, programmers achieve this desirable outcome by offering inducements to MVPDs (such as discounts on the programmer's more popular networks) to encourage the MVPD to carry new channels. The Commission has expressed concern, however, that this practice leads to higher prices at the retail level, because MVPDs are compelled to accept and pay for undesirable programming included in the package offered by the programmer and pass these program costs through to subscribers.[122] This concern, according to Dr. Owen, "betrays a fundamental misunderstanding of the video programming marketplace," because the competitive price for a package may in fact be less than the competitive price for a stand-alone unit of content:[123]

> Program suppliers offer both established content with relatively high demand and newer or less popular content that requires additional penetration in order to succeed. The standalone competitive price for the new or less popular content may well be negative. In other words, the program supplier would be willing to pay the MVPD for higher penetration for certain channels, both because that lowers unit costs per subscriber and because it increases advertising revenue. The payment to carry less desirable content may take the form of a price discount on the more popular content if the MVPD agrees to take both. As a result, the competitive price for a package of content may be less than the competitive price for a stand-alone unit of content – whether a popular program or a popular channel – by itself. This can lead to the erroneous conclusion that the supplier is "forcing" the buyer to carry the less popular network.[124]

Because the wholesale market for video programming networks appears to be functioning competitively and effectively, Dr. Owen suggests that the Commission's puzzling concern with wholesale marketing practices must be related to its belief that wholesale packaging (if it existed in the form described by the Commission in the NPRM) is the cause of retail bundling or tiering, with which the Commission also has expressed concern.[125] If so,

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[122] NPRM, ¶ 120.

[123] 2008 Owen Report at 38.

[124] *Id.* As Dr. Owen suggests and as the Commission has recognized, wholesale carriage negotiations are not just about price, but involve a host of other issues, including penetration levels, quality of signal and channel placement. Because wholesale carriage negotiations are so complex, government intervention is likelier to defeat, rather than facilitate, a successful outcome by limiting the substantive give-and-take and possible points of agreement between the parties. As the Commission stated in the Good Faith Order (¶ 56): "By allowing the greatest number of avenues to agreement, we give the parties latitude to craft solutions to the problems of reaching retransmission consent."

[125] *See, e.g.*, "Further Report on the Packaging and Sale of Video Programming Services to the Public" (Media Bureau, Feb. 9, 2006).

that concern is misplaced.[126] As Dr. Owen explains, retail bundling is extremely common; it occurs for a multitude of economically sound reasons; and it is by no means sinister.[127] As just one example, it is likely that bundling occurs, at least in part, because consumers gain more from purchasing a bundle of goods that they would from buying the goods individually. This may result because it is cheaper to produce and market a bundle than it would be to produce and market individual components, which suggests that the components will cost more, in the aggregate, than the price of the bundle. Given higher prices, customers will demand fewer individual components or will choose the lower-cost bundle.

In the realm of video programming sales, the cable operators' rationale for placing individual programming channels into particular tiers is quite simple. Most non-premium programming networks are supported both by customers (i.e., MVPDs paying per-subscriber fees and retail customers paying their monthly cable bills) and by advertisers. Any change in carriage of an advertiser-supported programming network that reduces audience penetration will reduce advertising revenues. This in turn will lead to a "negative feedback effect," resulting in reduced customer pricing and expenditures on program quality, which will further reduce advertiser demand for the channel. To avoid this downward spiral, programmers are willing to negotiate lower subscriber fees from MVPDs that are willing to commit to carry the programming to as many subscribers as possible. Because this economic principle holds true for all advertiser-supported networks, programmers offer the

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[126] 2008 Owen Report at 33. Of course, some tiering occurs as a matter of statutory mandate. Section 623(b)(7) of the Communications Act of 1934, as amended (codified at 47 U.S.C. § 543(b)(7)), requires each cable operator to offer a separately available basic service tier to which subscription is required for access to any other tier of service. The basic service tier must include all broadcast signals carried pursuant to must-carry and retransmission consent or otherwise provided by the cable operator to any subscriber. 47 U.S.C. § 543(b)(7) (i)-(iii).

[127] 2008 Owen Report at 33.

most incentives for guarantees of program delivery to the largest number of subscribers. To take advantage of these incentives, MVPDs choose to place channels on the tiers with higher subscriber levels. But such bargaining is far from the "all or nothing" approach the Commission posits without any factual support.[128]

Moreover, cable operators have offered bundled services from the very inception of cable service – long before non-broadcast programming services evolved. When cable systems served primarily as relays for broadcast signals, these signals were offered to subscribers in a bundle. Over time, non-broadcast programming networks emerged. Some of these networks were "premium" channels offered to subscribers on a standalone basis. Other networks, however, were considered "basic" and were provided to all subscribers as part of a bundled service that served the needs of the cable operators and provided subscribers with more diverse programming choices.[129]

Commission intervention in the voluntary, multi-faceted wholesale transactions between programmers and MVPDs would not eliminate retail tiers. MVPDs will continue to group channels into tiers because such tiering reduces transactional, administrative and equipment costs and offers more programming choices to consumers. Further, if the Commission in this proceeding were to prohibit programmers from negotiating for subscriber levels and/or tier placement in their carriage agreements with MVPDs, programmers, operators and subscribers would all be adversely affected. Programmers' advertising revenues would decline, which would result in an increase in the per-subscriber fees paid by MVPDs, a reduction in program quality or both. In addition to being charged

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[128] 2008 Owen Report at 34.

[129] *Id.* at 36-37.

higher per-subscriber fees to offset the programmers' loss of advertising revenues, which would be passed through to subscribers, operators would lose the variety of incentives that programmers now offer to persuade them to deliver their networks to the greatest number of subscribers. And consumers would of course enjoy far less diversity and choice in the programming available on the most penetrated tiers while paying more for the programming services they receive.[130]

Retail packaging of program channels in tiers also reduces other MVPD costs and thus tends to reduce overall prices for MVPD services for subscribers. For example, retail tiering reduces the costs incurred by MVPDs for equipment and customer service that would otherwise be needed to distribute highly customized combinations of programming. In a strictly a la carte retail environment, MVPDs would have to supply their subscribers with expensive individually-addressable set-top boxes for each television set in the home, including the millions of currently installed sets that are "cable ready" and operate without set-top boxes. Subscribers would bear the brunt of this requirement through increased equipment rental fees. A la carte distribution would also increase MVPDs' administrative costs, due to the complexities of channel-by-channel ordering and billing. These costs, too, would be passed on to subscribers in the form of higher monthly rates.

Retail program packages also decrease the need for intensive marketing by programmers to encourage subscriptions to individually sold channels. If channels currently

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[130] The Commission appears to contemplate that one solution to the problem of rising retail rates for MVPD services may be direct rate regulation. *See, e.g.,* NPRM, ¶ 131. Most of the program channels at issue in this proceeding other than the broadcast channels subject to retransmission consent are carried on expanded basic tiers. While the Commission has authority to regulate the rates for the basic tier (consisting of local broadcast signals and public, educational and government channels), Congress terminated the Commission's authority to regulate the rates of non-basic program tiers in 1999. *See* 47 U.S.C. §§ 543(b)(7)(A), & 543(c)(4). Accordingly, the Commission has no statutory authority to regulate the rates charged by MVPDs for programming carried on the upper tiers.

sold on widely subscribed tiers were required to be sold on a retail a la carte basis, they would be forced to incur substantially increased marketing expenses simply to attract subscribers – money that would be better spent on developing quality programming. According to NCTA, most programming channels spend two to six percent of total net revenues on marketing.[131] NCTA estimates that these expenditures would increase to as much as 20-30 percent of revenues in an a la carte environment.[132] All of these increased marketing expenditures would increase the wholesale programming costs and ultimately would be passed on to consumers.[133]

Finally, a Commission regulation prohibiting wholesale packaging, retail tiering or both will certainly diminish programming diversity and choice. A fundamental tenet of communications policy in the United States is that "the widest possible dissemination of information from diverse and antagonistic sources is essential to the welfare of the public."[134] Congress, the Commission, and the courts have all stated that diversity is one of the most important objectives of federal communications policy. The incredible diversity of video programming available in the U.S. is unquestionably threatened by an a la carte regime. The Commission's 2004 a la carte report stated that there was "a near universal response from program networks, cable operators, and others, that a la carte regulation, of

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[131] *FCC Report on the Packaging and Sale of Video Programming*, at 50 (Nov. 18, 2004).

[132] *Id.* As a point of reference, under the current system, total costs for programming, including marketing costs, amount to less than one-third of the revenues cable operators derive from their subscribers. *See* David Leach, "The Effect of Retransmission Consent Negotiations on the Price and Quality of Cable Television Service," MB Docket No. 06-189 (submitted by CBS Corporation, Fox Entertainment Group, NBCU and The Walt Disney Company on July 17, 2007).

[133] The GAO has concluded that retail a la carte may result in higher cable subscriber fees. *See, e.g.*, U.S. General Accountability Office, *Testimony Before the Chairman, Committee on Commerce, Science, and Transportation, U.S. Senate, Subscriber Rates and Competition in the Cable Television Industry*, GAO-04-262T, at 13-16 (March 25, 2004).

[134] *Turner Broadcasting Sys., Inc. v. FCC*, 512 U.S. 622, 663-64 (1994).

any type, would harm consumers because the public's interest in program diversity would be threatened."[135] A "diverse array" of interest groups and public officials from all across the country urged the Commission to reject a la carte "because of its severe impact on diversity." These comments echoed the comments provided to the GAO in its 2003 study of cable rates:

> Most of the cable networks we interviewed also believe that programming diversity would suffer under an a la carte system because some cable networks, especially small and independent networks, would not be able to gain enough subscribers to support the network. . . . [F]ewer networks would remain financially viable and new networks would be less likely to be developed. . . . [S]maller networks or those providing specialty programming would be hurt the most by an a la carte system. . . . [L]aunching a new network under an a la carte system would be very difficult. . . .[A]n a la carte approach could result in the disappearance of many networks. . . .[136]

Cable analyst Craig Moffett of Sanford C. Bernstein agrees and argues that niche programming and channels that appeal to particular audiences, such as Black Entertainment Network, would be the first to vanish in an a la carte world. To illustrate, Mr. Moffett explains that if every African-American family in the U.S. subscribed to BET, it would

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[135] "Report on the Packaging and Sale of Video Programming Services to the Public" at 53 (Media Bureau, Nov. 18, 2004). We recognize that the Commission issued a revised "Further Report" in 2006 that attempted to rebut or "correct" a number of the conclusions contained in the 2004 report. *See* "Further Report on the Packaging and Sale of Video Programming Services to the Public" (Media Bureau, Feb. 9, 2006). We agree with the conclusions of Dr. Owen in his comments submitted to the Commission on the 2006 report. *See* Bruce M. Owen, The FCC "Further Report" on the Retail Marketing of Video Programming Services: An Economic Review," MB Docket 04-207 (Mar. 28, 2006) ("The Commission's basis for reversing its previous stance is an incomplete, result-oriented and misleading reading of the identical record relied upon in the Commission's earlier report. . . . The Commission in its "Further Report" distorts [substantial] economic learning, and uses selective examples to imply that bundling of video channels is necessarily harmful to consumers.") Accordingly, we conclude that it is appropriate to continue to rely on information contained in the 2004 report. We note, moreover, that while the 2006 report posits that "a la carte could be preferable to bundling in providing diverse programming," that report did not refute the comments of programmers and others expressing concern about the loss of diversity in an a la carte regime. *See id.*, ¶¶ 66-80.

[136] *See, e.g.*, U.S. General Accountability Office, "Issues Related to Competition and Subscriber Rates in the Cable Television Industry," Report to the Chairman, Committee on Commerce, Science, and Transportation, U.S. Senate, at 36 (Oct. 2003).

have to raise its per-subscriber fees by 588 percent to survive. If only half of these families subscribed, the fees would increase by 1,200 percent.[137]

Concern among programmers, public officials and public interest groups over the harm to program diversity that would be caused by an a la carte regime has not diminished since the Commission reported these concerns in the 2004 report.[138] A loss of program diversity – whether from an ill-advised intervention into the wholesale programming market or the retail market or both – clearly would not serve the Commission's overarching goal of fostering "the widest possible dissemination of information from diverse and antagonistic sources."

[137] *See* Joe Nocera, "Bland Menu if Cable Goes a la Carte," New York Times (Nov. 24, 2007).

[138] *See, e.g.*, Letter from Reverend B.J. Choice, et al., to Commissioners Michael Copps and Jonathan Adelstein, et al., MB Docket No. 06-189 (submitted Nov. 20, 2007) (noting that "a la carte regulations would likely kill off most minority-owned networks").

VI. CONCLUSION

For the foregoing reasons, NBCU urges the Commission to refrain from intervening in the marketplace negotiations between programmers and MVPDs. The marketplace is functioning just as Congress intended, and agreements between programmers and MVPDs have served American consumers very well by bringing them an abundance of diverse and affordable programming options.

Respectfully submitted,

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